MOTION FILED
SEP 19 1980

No. 80-273

In the Supreme Court of the United States

OCTOBER TERM, 1980

HART AND MILLER ISLANDS AREA ENVIRONMENTAL GROUP, INC., ET AL.,

Petitioners,

vs.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.,

Respondents.

Motion for Leave to File *Amicus Curiae* Brief of Sierra Club and National Wildlife Federation in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit and *Amicus Curiae* Brief of Sierra Club and National Wildlife Federation in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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Sierra Club and National Wildlife Federation hereby respectfully move this Court, pursuant to Supreme Court Rule 36.1, for leave to file the attached *Amicus Curiae* Brief of Sierra Club and National Wildlife Federation in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

Petitioners Hart and Miller Islands Area Environmental Group, Inc., et al., and Respondents United States Army Corps of Engineers have consented to the filing of this brief, as evidenced by written correspondence with counsel for movants dated September 16 and September 11, 1980, respectively, copies of which are on file with the Clerk of the Court.

Respondents State of Maryland and Steamship Trade Association of Baltimore, Inc., each have under advisement movants' request that they consent to the filing of this brief but as of this date they have neither consented nor refused to consent to such filing. Counsel for the Steamship Trade Association of Baltimore, Inc., however, informed counsel for movants on September 15, 1980 that he did not believe his clients would consent.

Respectfully submitted,

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September 17, 1980

TABLE OF CONTENTS

Page

Interest of Amici Curiae 1

Argument: The Fourth Circuit Decision in This Case Presents an Important Question of Federal Law on Which the Lower Courts Are Split and Which This Court Should Now Resolve 5

Conclusion 8

TABLE OF AUTHORITIES

Cases:	Pages
Citizens' Committee for Columbia River v. Calloway, 494 F.2d 124 (9th Cir. 1974)	6
Citizens' Committee for Environmental Protection v. U.S. Coast Guard, 456 F.Supp. 101 (D. N.J. 1978)	7
Citizens' Committee for the Hudson Valley v. Volpe, 425 F.2d 97 (2nd Cir. 1970)	6
Citizens' Committee for the Hudson Valley v. Volpe, 302 F.Supp. 1083 (S.D. N.Y. 1969)	6
Leslie Salt Co. v. Froehlke (Secretary of the Army) and Sierra Club, 578 F.2d 742 (9th Cir. 1978)	3, 7
Leslie Salt Co. v. Froehlke (Secretary of the Army), 403 F.Supp. 1292 (N.D. Cal. 1974)	7
Natural Wildlife Federation v. Alexander (II), No. 80-1391 (D.C. Cir.)	4
National Resources Defense Council v. Calloway, 392 F.Supp. 685 (D. D.C. 1975)	4
Petterson v. Resor, 331 F.Supp. 1302 (D. Ore. 1971)	6, 7
Sierra Club v. Andrus, 610 F.2d 581 (9th Cir. 1979)	6, 7
Sierra Club v. Leslie Salt Co., C-72-561 WTS (N.D. Cal. 1980)	7
Sierra Club v. Leslie Salt Co., 412 F.Supp. 1096 (N.D. Cal. 1976)	7
Sierra Club v. Leslie Salt Co., 354 F.Supp. 1099 (N.D. Cal. 1972)	3, 7
Sierra Club v. Morton, 400 F. Supp. 610 (N.D. Cal. 1975)	6
United States v. Munsingwear, 340 U.S. 36, 40 (1950)	6

STATUTES:

Pages

Section 9 of the Rivers and Harbors Act, 33 U.S.C. § 401 ..... *Passim*

Section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403 ..... 4, 5

Section 404 of the Clean Water Act, 33 U.S.C. § 1344 4

REGULATIONS:

33 C.F.R. § 321.2(c) 4

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Amicus Curiae Brief of Sierra Club and National Wildlife Federation in Support of Petition for a Writ of Certiorari of the United States Court of Appeals for the Fourth Circuit

INTEREST OF AMICI CURIAE

Amicus curiae Sierra Club is a non-profit corporation organized and existing under and by virtue of the laws of the State of California, having its principal place of business at 530 Bush Street, San Francisco, California 94108. The Sierra Club is a national conservation organization having approximately 184,000 members.

The objectives of the Sierra Club include conservation, the protection and sound management of natural resources, and the preservation and enhancement of our environment. The stated corporate purposes of the Sierra Club are:

> To enhance and protect by all lawful means the natural resources and human environment of the United States and the earth in general; to explore, enjoy, and preserve the scenic resources of the United States and its forests, waters, wildlife and wilderness; to undertake and to publish scientific, literary, and educational studies concerning them; to educate the people with regard to the national and state forests, parks, monuments, and other natural resources of especial scenic beauty and to enlist public interest and cooperation in protecting them.

The scope of Sierra Club's concerns encompasses the preservation and wise utilization of the navigable waters of the United States. Members of the Sierra Club regularly use and enjoy these water resources for fishing, boating, camping, photography, study, and other forms of recreational, scientific and spiritual activity.

Sierra Club's interest in this case results from its long standing concern with what it considers to be the proper interpretation and implementation of Sections 9 and 10 of the Rivers and Harbors Act, 33 U.S.C. §§ 401 and 403, by the United States Army Corps of Engineers in environ-

mental protection matters. Sierra Club has manifested this concern, among other ways, by engaging in appropriate litigation intended both to compel the Corps to implement Sections 9 and 10 vigorously, and to defend the Corps when it has done so. See, e.g., *Leslie Salt Co. v. Froehlke (Secretary of the Army) and Sierra Club,* 578 F.2d 742 (9th Cir. 1978) (defense of Corps' assertion of Sections 9 and 10 regulatory jurisdiction in tidal marshlands to the line of mean higher high water [MHHW] on the Pacific Coast).

On occasion the Sierra Club itself has sued as private attorney general to compel compliance with Sections 9 and 10 by private parties when the Corps has failed to do so. See, e.g., *Sierra Club v. Leslie Salt,* 354 F. Supp. 1099 (N.D. Cal. 1972). Sierra Club has been involved continuously in one such case for the last eight years. See *Leslie Salt Co. v. Froehlke and Sierra Club, supra,* at 578 F.2d 744-745, for a summary of this lengthy litigation. As is discussed below, that case is presently pending (for the second time) before the United States Court of Appeals for the Ninth Circuit for resolution of the identical issue presented to this Court in this case.

The National Wildlife Federation is a non-profit membership corporation organized under the laws of the District of Columbia. It is dedicated to the restoration, wise use, and perpetuation of the natural resources of North America, including the public resources of the navigable waters of the United States. Its principal office is at 1412 16th Street, N.W., Washington, D.C. 20036. The Federation is the nation's largest conservation organization with a combined membership of over three million persons. Members of the Federation regularly use and enjoy the water resources of the nation's coastal and inland navigable

waters for fishing, hunting, camping, boating, photography, study and other forms of outdoor recreation. As a group the individuals comprise a substantial number of public users of the navigable waters.

The National Wildlife Federation has manifested its interest in dredge and fill disposal and construction activities in the navigable waters in a variety of ways—legal, administrative, and legislative. For example, the National Wildlife Federation has actively litigated the issue of the jurisdictional scope of "navigable waters of the United States" under both Section 10 of the 1899 Rivers and Harbors Act and under Section 404 of the 1977 Clean Water Act, 33 U.S.C. § 1344, and the issue of the substantive reach of the third clause of Section 10 of the 1899 Rivers and Harbors Act. See, e.g., *National Wildlife Federation v. Alexander (II)*, No. 80-1391 (D.C. Cir.) (decision pending) (substantive scope of Section 10); *Natural Resources Defense Council v. Calloway*, 392 F. Supp. 685 (D. D.C. 1975) (jurisdictional scope of Section 404). The National Wildlife Federation has also actively pressed administratively and legislatively to expand the jurisdictional and substantive base of Sections 10 and 404 and to resist efforts to limit federal jurisdiction over activities impacting upon navigable waters of the United States.

The control of diked containment structures in navigable waters, at issue in this litigation, has significant implications for the water resources in which the National Wildlife Federation and its members have a compelling interest.

ARGUMENT: THE FOURTH CIRCUIT DECISION IN THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW ON WHICH THE LOWER COURTS ARE SPLIT AND WHICH THIS COURT SHOULD NOW RESOLVE.

Amici curiae Sierra Club and National Wildlife Federation endorse fully the arguments presented by Petitioners at pages 11 through 21 of their Petition for a Writ of Certiorari, "Reasons for Granting the Writ." The issue of what structures within navigable waters of the United States constitute "dikes" within the meaning of Section 9 of the Rivers and Harbors Act, 33 U.S.C. § 401, is an important one on which the lower federal courts are in hopeless disagreement. The practical result of labeling a particular structure a "dike" is that such a structure requires not only permission from the Corps of Engineers, but express Congressional authorization. Structures that do not fall within the category of "dike" (or "bridge", "dam", or "causeway"), do not require the consent of Congress, but may be authorized by the Corps alone pursuant to Section 10 of the Act, 33 U.S.C. § 403.

The Corps has taken the position in this case[1] that an enormously expensive and environmentally disruptive structure in the navigable waters which admittedly is designed to and does in fact control or hold back the waters of the sea or a river, and therefore is a "dike" within the commonly accepted, dictionary meaning of that term, is not, however, a "dike" within the meaning of Section 9 because it does not "completely span" the particular navigable water in which it sits. Thus by means simply of promulgating a regulatory definition that runs counter to the

1. And elsewhere, see 33 C.F.R. § 321.2(e): ("The term 'dike' means an embankment, low dividing wall, or other protective barrier that completely spans a navigable water of the United States and that may obstruct interstate waterborne commerce.")

commonly understood meaning of what constitutes a dike, the Corps arguably has usurped a significant portion of the regulatory authority over navigable waters that Congress intended to reserve to itself in Section 9. Whether this is so should be settled once and for all by this Court: this case presents the opportunity for the court to do so.

Amici curiae agree with Petitioners that a split now exists among the circuits on this question. The Fourth Circuit in this case held that a structure must completely span a navigable waterway in order to be considered a "dike" within the meaning of Section 9 and therefore to require the consent of the Congress; the Second Circuit in *Citizens' Committee for the Hudson Valley v. Volpe,* 425 F.2d 97, 106 (2nd Cir. 1970), affirming *Citizens' Committee for the Hudson Valley v. Volpe,* 302 F.Supp. 1083 (S.D. N.Y. 1969), has held to the contrary.

The law is in a similar state of disarray among the district courts. Within the Ninth Circuit alone three district courts have reached differing conclusions. The court for the District of Oregon held that a Section 9 "dike" must completely span a navigable water and actually obstruct navigation. *Petterson v. Resor,* 331 F. Supp. 1302 (D. Ore. 1971).[2] The court for the Northern District of California, on the other hand, stated in *dicta* that an obstruction to the navigable waters need not completely span those waters to be a Section 9 "dike", but rather that such a structure need only conform to the ordinary meaning of that term. *Sierra Club v. Morton,* 400 F. Supp. 610, 626 (N.D. Cal. 1975), *aff'd in part, rev'd in part, Sierra Club v. Andrus,*

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2. *Petterson* was vacated as moot by the Ninth Circuit, *sub nom. Citizens' Committee for Columbia River v. Calloway,* 494 F.2d 124 (9th Cir. 1974). Regardless of the merits of its reasoning, *Petterson* therefore carries no authoritative weight. See *United States v. Munsingwear,* 340 U.S. 36, 40 (1950). It nevertheless continues to be cited, most recently by the Fourth Circuit in this case.

610 F.2d 581 (9th Cir. 1979),[3] petition for certiorari pending *sub nom. California v. Sierra Club* (No. 79-1252, filed Feb. 13, 1980); *Kern County Water Agency v. Sierra Club* (No. 79-1502, filed March 17, 1980); and *Sierra Club v. Andrus* (No. 79-1625, filed April 16, 1980). Finally, a different judge in the Northern District of California recently added to the confusion in an unreported decision by regressing to the *Petterson* reasoning and holding that dikes (in that case dikes constructed in tidal marshlands in South San Francisco Bay to control the waters of the Bay in order to create salt evaporation ponds) as commonly understood are not "dikes" for purposes of Section 9 if they do not completely span a navigable waterway. *Sierra Club v. Leslie Salt Co.*, C-72-561 WTS (N.D. Cal. January 15, 1980), appeal to Ninth Circuit pending, *Sierra Club v. Leslie Salt Co.* (9th Cir. No. 80-4095).[4]

One additional district court opinion completes the picture: *Citizens' Committee for Environmental Protection v. U.S. Coast Guard*, 456 F. Supp. 101 (D. N.J. 1978), which, without any independent analysis whatsoever, simply followed *Petterson, supra*, apparently unaware that *Petterson* had been vacated as moot by the Ninth Circuit.

Whether the Corps of Engineers may, without Congressional consent, lawfully authorize construction projects within the navigable waters of the United States that have

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3. The question of what structures constitute Section 9 "dikes" was not raised on appeal and is not discussed in the Ninth Circuit decision.

4. The *Leslie Salt* litigation had its genesis in 1972 and has resulted to date in four officially reported decisions. *Sierra Club v. Leslie Salt*, 354 F. Supp. 1099 (N.D. Cal. 1972); *Leslie Salt Co. v. Froehlke (Secretary of the Army)*, 403 F. Supp. 1292 (N.D. Cal. 1974); *Sierra Club v. Leslie Salt Co.*, 412 F. Supp. 1096 (N.D. Cal. 1976); *Leslie Salt Co. v. Froehlke and Sierra Club*, 578 F.2d 742 (9th Cir. 1978). The issue at bar had not, however, been raised in that litigation prior to the January 15, 1980 district court opinion.

the effect of holding back or controlling in some significant way those waters should not depend upon in what federal judicial Circuit, or what district within a particular Circuit, the project happens to be situated. It is respectfully submitted that an authoritative interpretation of this 80-year-old statute is desirable and long overdue.

CONCLUSION

The Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit should be granted.

Respectfully submitted,

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